

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THEODORE H. SNEE and DEPARTMENT OF THE NAVY,
NAVAL TRAINING CENTER, Orlando, Fla.

*Docket No. 96-2055; Submitted on the Record;
Issued June 22, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether appellant has established that he sustained a recurrence of disability on January 1, 1989 causally related to his October 19, 1988 employment injury; (2) whether appellant has more than a 13 percent impairment to his right foot for which he has received a schedule award.

The Board has duly reviewed the case record and finds that appellant has not established that he sustained a recurrence of total disability on January 1, 1989.

In the present case, appellant, an electrician, fell on October 19, 1988 and sustained a fractured right foot, necessitating a closed reduction of the right foot which was performed on the day of injury. The Office of Workers' Compensation Programs accepted appellant's claim and paid appellant temporary disability benefits until appellant returned to a light-duty position on November 22, 1988. Appellant stopped work on December 21, 1988 and resigned his federal employment. Appellant thereafter filed a notice of recurrence of disability alleging that he was totally disabled after January 1, 1989. The facts of the case are fully set forth in the decision of the Office hearing representative dated May 16, 1996 and are hereby incorporated by reference.

The Board has held that when an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extend of the injury-related condition or a change in the nature and extent of the light-duty job requirements.¹

¹ *Terry R. Hedman*, 38 ECAB 222 (1986); *see also Gus N. Rodes*, 46 ECAB 518 (1995).

In the present case, appellant did not submit any medical evidence to the record to substantiate that he could not perform the light-duty position. Rather, appellant alleged that he resigned the light-duty work because the employing establishment was about to terminate his employment for misconduct, for falsification of his employment application. The evidence of record does not establish that the employing establishment had taken any formal action to cause any change in the nature and extent of appellant's light-duty job requirements.

Section 8102(a) of the Federal Employees' Compensation Act² sets forth the basis upon which an employee is eligible for compensation benefits. That section provides:

"The United States shall pay compensation as specified b this subchapter for the disability or death of an employee resulting from person injury sustained while in the performance of his duty...."

In general the term "disability" under the Act means "incapacity because of injury in employment to earn the wage which the employee was receiving at the time of such injury."³

Even if appellant did resign because the employing establishment was about to institute proceedings to terminate his employment, the evidence of record would have to establish that that the termination of appellant's employment was due to his physical inability to perform his assigned duties, rather than misconduct. The Board has held that an employing establishment's termination of employment for unacceptable conduct by the employee does not establish "disability" for work within the meaning of the Act.⁴

The Office hearing representative properly found that during the hearing held on November 1, 1995 appellant's representative acknowledged that appellant's employment was to be terminated, though not due to his injury. Appellant also acknowledged at the hearing that at the time he resigned his employment, he was capable of performing the light-duty job. Appellant has submitted witness statements and testimony to the record regarding how he and other light-duty employees were treated by the employing establishment. Ultimately, however, the record establishes appellant chose to resign from his employment to avoid termination of his employment. If the employing establishment had instituted formal termination proceedings, it would have done so due to appellant's alleged falsification of his employment application, not due to appellant's inability to work resulting from the accepted injury.

The evidence of record therefore does not establish that appellant sustained a recurrence of total disability after January 1, 1989 due to his employment-related injury. Rather, the evidence establishes that appellant resigned his employment to avoid possible termination proceedings due to the falsification of his employment application.

² 5 U.S.C. § 8102(a).

³ See *Maxine J. Sanders*, 46 ECAB 835 (1995).

⁴ *John W. Normand*, 39 ECAB 1378 (1988).

The Board also finds that appellant has not established that he has more than a 13 percent permanent impairment of the right foot, for which he has received a scheduled award.

On February 7, 1990 the Office granted appellant a schedule award for 13 percent permanent impairment of the right foot. Regarding this issue, whether appellant has established that he has more than a 13 percent permanent impairment of the right foot, the Board has given careful consideration to the issues involved, the contentions of appellant on appeal and the entire case record. The Board finds that the decision of the Office hearing representative, dated May 16, 1996 and finalized on May 17, 1996 is in accordance with the facts and law in this case and hereby adopts the findings and conclusions of the hearing representative.

The decision of the Office of Workers' Compensation Programs dated May 16, 1996 and finalized on May 17, 1996 is hereby affirmed.

Dated, Washington, D.C.
June 22, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member